U.S. Department of Justice

Immigration and Naturalization Service

B4

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

Public Copy

FILE: [redacted] OFFICE: CALIFORNIA SERVICE CENTER DATE: JAN 8 2001

IN RE: PETITIONER: [redacted]
BENEFICIARY:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

[redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Mary C. Mulrean, Acting Director
Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was originally approved by the Director, California Service Center. On the basis of new information received and on further review, the District Director, Los Angeles, California determined that the beneficiary was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with a notice of intent to revoke the approval of the immigrant petition, and ultimately revoked the approval of the petition. The director's decision to revoke the approval of the petition was affirmed by the Associate Commissioner for Examinations on appeal. The matter came before the Associate Commissioner on a motion to reopen and the motion was dismissed. The matter is now before the Associate Commissioner on a second motion to reconsider. The motion will be granted. The petition will be denied.

It is noted for the record that the petitioner has a second case that is pending review before this office. The petitioner has filed an appeal of a nonimmigrant petition (WAC 98 254 52923) which was denied by the director of the California Service Center. The nonimmigrant record will be referenced in this proceeding, for the purpose of presenting uniform decisions in both matters.

The petitioner is a California corporation which originally claimed to be engaged in the import and export of health care products. The petitioner further asserted that it was the ultimate subsidiary of a Hong Kong company, Penita Investment Ltd. It seeks to employ the beneficiary in the United States as its chief executive officer. The director determined that the petitioner had not established that it maintained a qualifying relationship with the claimed overseas parent company, as the Hong Kong company was no longer an active business enterprise. The Associate Commissioner affirmed these determinations on appeal. The petitioner's first motion was dismissed after the petitioner failed to submit a brief for the record. On second motion, the petitioner submits evidence to establish that a brief was submitted and requests that the previous decisions be withdrawn.

Regarding this immigrant classification, section 101(a)(44) of the Immigration and Nationality Act (the Act) defines managerial and executive capacity. Furthermore, 8 C.F.R. 204.5(j) provides the regulatory framework for the multinational manager and executive immigrant visa petition. As the law and regulations were recited and discussed in the previous decisions, the legal criteria for this visa classification will not be cited in full here.

In the original decision, the director determined that the claimed overseas parent company, Penita Investment Limited (Penita-Hong Kong), did not have employees, an office, or an active telephone number. The director concluded that [redacted] was not an active business. Accordingly, after giving the petitioner proper notice, the director revoked the approval of the immigrant visa petition.

[redacted]

On appeal, the petitioner asserted that [redacted] is a holding company and is conducting business through its subsidiaries [redacted], in Taiwan, and [redacted] of Malaysia. In support of this claim, the petitioner submitted copies of licenses, business registrations, tax returns, articles of incorporation, and other documents for the two claimed subsidiaries.

In dismissing the appeal, the Associate Commissioner noted that the petitioner had disclosed that there was a dispute regarding the ownership of [redacted] due to a claimed "fraudulent stock transfer." Citing the director's original decision, the Associate Commissioner also noted that the beneficiary was allegedly involved in the operation of an illegal bank through the claimed parent company, [redacted], and that the Taiwanese government had "closed down the [redacted]" Finally, the decision of the Associate Commissioner noted that the beneficiary was employed in the United States by [redacted] Corporation [redacted], which had not been established as a related company. The Associate Commissioner concluded that "[s]ince the Hong Kong company no longer existed when this petition was filed, the petitioner did not have a qualifying relationship with the companies stated to be subsidiaries of the non-existent company at the time of filing of this petition."

On motion, the petitioner asserts that "the foreign concern, [redacted] conducted and continues to conduct business through its subsidiary companies located in Malaysia, Taiwan and the United States for more than ten (10) years." In support of this claim, the petitioner submitted additional documents for the record, including copies of balance sheets, income tax returns, and sales reports for the claimed affiliate, [redacted] The petitioner submitted a copy of a letter from the Registry of Companies for the Government of Hong Kong, acknowledging that [redacted] was incorporated in 1987 and remains on the Hong Kong Register of Companies. The petitioner also submitted copies of [redacted] annual returns for the years 1995, 1996, and 1997, as well as copies of documents from a transaction conducted by [redacted] in 1992. Regarding the beneficiary's employment by [redacted] International, counsel for the petitioner asserted that the company is wholly-owned by the petitioning company, and therefore qualifies as a subsidiary. Finally, counsel asserted that the allegations of criminal conduct were libelous and without merit.

Counsel's assertions are not persuasive. The petitioner has not submitted sufficient evidence to establish that the claimed parent company is doing business. The petitioner did not submit evidence to establish that [redacted] is an established enterprise that is doing business in a regular, systematic and continuous manner. The petitioner has not submitted evidence that would demonstrate that the entity has an established office or a staff

to conduct the business of the enterprise. The fact that the company remains on the Hong Kong Register of Companies does not establish that the company is conducting business in a regular, systematic, and continuous manner. In the nonimmigrant petition, the petitioner indicates that it has contracted a management service, [redacted] to act as company secretary and representative in Taiwan since 1999. While the petitioner claims that the parent company is doing business as a holding company, it must be noted that the definition of "doing business" specifically precludes the mere presence of an agent or office. 8 C.F.R. 204.5(j)(2).

Although the petitioner submitted copies of the parent company's annual reports, these documents are not persuasive. First, the annual reports reveal that no annual meetings were held during the years 1995, 1996, or 1997. It is also noted that the annual reports for the years 1995, 1996, and 1997 were all signed by [redacted] on April 14, 1998, after the director revoked the approval of the immigrant petition. It is further noted that the signature of "[redacted]" does not match other signatures of this individual, as exemplified on other documents contained in the record. Furthermore, many of the dates on the annual reports appear to have been altered with correction fluid. Finally, the petitioner did not submit evidence to establish that the annual reports were actually filed with the Hong Kong Companies Registry. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988).

Furthermore, the business activities of the claimed subsidiaries may not be attributed to [redacted] as the petitioner has not established that a qualifying relationship exists between the companies and the petitioner. In the original petition, the petitioner submitted a copy of a "corporate chart," which merely listed the petitioning company as a wholly-owned subsidiary of [redacted], which in turn was represented as a wholly-owned subsidiary of [redacted] In response to the notice of intent to revoke, the petitioner submitted letters from the petitioner's accountant and attorney which state that the beneficiary was formerly employed by [redacted]. Finally, on motion, the petitioner has submitted a copy of the beneficiary's initial nonimmigrant petition, which contains another "corporate chart" and one stock certificate for [redacted]

This is not sufficient evidence to establish that a qualifying relationship exists between the petitioner and the claimed parent company, [redacted] The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this immigrant visa classification. Matter of Church of Scientology

International, 19 I&N Dec. 593 (BIA 1988); *see also* Matter of Siemens Medical Systems, Inc., 19 I&N Dec. 362 (BIA 1986); Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982)(in nonimmigrant visa proceedings). In context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. Matter of Church of Scientology International at 595.

As general evidence in an immigrant petition for a manager or executive, the graphical representation of the corporate relationship and letters from accountants and attorneys will not suffice to establish the claimed relationship. The Service must examine the stock certificates, the corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See* Matter of Siemens Medical Systems, Inc., supra. Without full disclosure of all relevant documents, the Service is unable to determine the elements of ownership and control.

In the related nonimmigrant petition, the petitioner submitted copies of stock certificates and other corporate documents, but failed to explain a discrepancy in the number of shares issued. On appeal, the petitioner's accountant explained the discrepancy, stating that there was an additional contribution of capital at the time of the merger between the petitioner and Penita-California, as well as a combination of related party accounts. No evidence was submitted in support of this claim. In dismissing the appeal, the Associate Commissioner also noted that the petitioner's tax returns reflected an ultimate indirect foreign shareholder of the petitioner's stock, indicating that there was an intervening entity that owned stock in the petitioning company. On motion, the petitioner claimed that the discrepancy was the result of "clerical error." Again, the petitioner failed to submit independent objective evidence that would suffice to clarify the record. See Matter of Ho, supra.

Regarding [redacted] the petitioner submitted copies of a deposition from a lawsuit that apparently challenged an allegedly fraudulent transfer of [redacted] stock. In the deposition, managing director [redacted] stated that [redacted] owns sixty percent of [redacted]. The petitioner did not submit any additional evidence of the claimed relationship or evidence that would establish the results of the lawsuit. Accordingly, the petitioner has introduced evidence that raises a question

regarding the actual ownership of [redacted] without submitting evidence to resolve the question.

Finally, with regard to the relationship between the petitioner and the beneficiary's previous employer, [redacted] International, counsel for the petitioner claims that [redacted] is a wholly-owned subsidiary of [redacted] In support of this claim, the petitioner submitted copies of the beneficiary's previous nonimmigrant petition. This evidence included the Form I-129 filed by Asean International in 1993; a chart representing [redacted] International as a wholly-owned subsidiary of the petitioner; and a copy of a stock certificate number nine, reflecting 10,000 shares of stock issued to [redacted] International Trading Corporation. This evidence is not sufficient to establish that Asean International is a subsidiary of the petitioning corporation. This one stock certificate, by itself, does not establish the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. The petitioner did not submit copies of the corporate stock certificate ledger, stock certificate registry, corporate bylaws, or the minutes of relevant annual shareholder meetings. Based on the evidence submitted on motion, it appears that the beneficiary's previous nonimmigrant petition was approved in error.

It is further noted that the petitioner submitted a copy of the 1996 IRS Form 1120, U.S. Corporation Income Tax Return, for [redacted] International Trading Corporation in the related nonimmigrant petition that is before the Administrative Appeals Office for review. Contrary to counsel's claims, this form reflects that the two officers of the corporation, the beneficiary and his wife, together own fifty-five percent of [redacted] International. The tax return also states that there is no foreign person that owned, directly or indirectly, at least 25 percent of Asean International. This evidence contradicts the petitioner's claim that [redacted] International is a wholly-owned subsidiary of [redacted] and an ultimate subsidiary of [redacted]. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. See Matter of Ho, supra.

Beyond the decision of the director, the record is not persuasive in demonstrating that the beneficiary would be employed in a managerial or executive capacity as required at 8 C.F.R. 204.5(j)(5). In the original petition, the petitioner claimed a total of 220 worldwide employees and a gross annual income of $15 million. The petition offers the following description of the beneficiary's proposed job duties:

> [The petitioner] would now like to employ [the beneficiary] permanently on a full-time basis in the

[redacted]

executive position of Chief Executive Officer at an annual salary of $50,000. In this executive position, [the beneficiary] will continue to perform the following duties:

- Formulating and implementing [the petitioner's] short-term and long-term business objectives and strategies.

- Exercising ultimate discretionary authority over all business decisions.

- Negotiating the terms of contractual arrangements with overseas and U.S. suppliers of health care products.

- Directing and coordinating [the petitioner's] sales of health care products in the U.S. and abroad.

- Hiring and firing of employees.

- Exercising the day-to-day direction and control over the corporation.

Although the petitioner originally claimed in September, 1993, that it was acting as an importer and distributor of latex examination gloves from [redacted] in Malaysia, the petitioner has now submitted evidence to establish that its claimed parent company had already sold SafeHealth Laboratory in October, 1992. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Id.

In describing the proposed position, the petitioner has provided a vague and indefinite description of the beneficiary's proposed job duties. The petitioner's description does not disclose the beneficiary's day-to-day activities, but instead appears to paraphrase parts of the statutory definitions of managerial and executive capacity. Based on the petitioner's description of these job duties, the Service is unable to determine whether the beneficiary is functioning in a primarily managerial or executive capacity, or whether the beneficiary is primarily performing non-managerial, non-executive duties. As 8 CFR 204.5(j)(5) specifically requires a clear description of the beneficiary's proposed duties, this evidence is not sufficient to establish that the beneficiary will be employed in a primarily managerial or executive capacity.

Furthermore, it is noted that the description directly contradicts the description of the beneficiary's duties, as characterized in the nonimmigrant petition. In the beneficiary's nonimmigrant petition, the petitioner stated that it was engaged in the sale of sporting goods and firearms, with a staff of four employees and a

gross annual income of $708,669. In addition, the nonimmigrant record contained numerous invoices which indicate that the beneficiary has conducted clerical duties, such as placing and receiving orders for firearms and accessories from the company's suppliers. The record does not establish that the beneficiary has been and will continue to function in a primarily managerial or executive capacity. As the petition will be denied, this issue need not be examined further.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. Accordingly, the previous decisions of the director and the Associate Commissioner will be affirmed, and the petition will be denied.

ORDER: The Associate Commissioner's decision of August 21, 2000 is affirmed. The petition is denied.